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No. 02-1493

IN THE

Supreme Court of the United States

CHRISTINE A. CUMMINGS; JANET TAYLOR DARVAS; RICHARD K. DEHART; CHRISTOPHER GARBANI; PATRICIA A. MCCUMSEY; DANIEL NOWALIS; CLAUDIA STEWART; AND THE CLASS THEY REPRESENT,
Petitioners,

v.

KATHLEEN CONNELL; MARTY MORGENSTERN; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION OF CSEA, LOCAL 1000 TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners Christine A. Cummings, *et al.* (hereinafter "Petitioners") have omitted from their Statement of the Case certain facts which are crucial to the Court's evaluation of Petitioners' fourth Question Presented, which challenges the Court of Appeals' remedial decision that the certified class of fair share fee payers is not entitled to an award of the return of either all of the fees collected or the so-called "non-chargeable" portion thereof. Specifically, Petitioners neglect

to mention that the *only* flaw in the relevant fair share fee notice was the omission of the auditor's verification and that, prior to the entry of summary judgment in the district court, the union corrected and reissued the notice, gave fee payers a new opportunity to object to or challenge the notice, and refunded the non-chargeable portion of the fee to all fee payers who timely did so. We set forth those facts in detail below, so that the Court may have a sufficient understanding of the case to assess the issues presented by Petitioners.

First, the *sole* flaw found by the district court and the Court of Appeals in the *Hudson* notice issued in June 1999 by Respondent California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO-CLC (hereinafter "CSEA"), was that CSEA omitted to include with that notice a copy of the independent auditor's report verifying the financial disclosure contained in the notice. It is not disputed that (1) the financial disclosure contained in the notice had in fact been audited and verified by an independent auditor; (2) the fee payers were informed in the notice that the financial disclosure had been audited and verified by an independent auditor; (3) the fee payers were informed in the notice of the name of the independent auditor; and (4) the fee payers were informed in the notice that a copy of the audit would be provided to them upon request. *See* Pet. App. A at 3a-4a. Thus, the *only* legal deficiency in the June 1999 notice was the omission of the auditor's verification. *See id.* at 8a ("In a case such as this one, in which the Union contends that the relevant figures were simply lifted from an audited financial statement, it should suffice for the notice to include a certification from the independent auditor that the summarized figures have indeed been audited and have been correctly reproduced from the audited report"). Petitioners do not seek review of any of these findings or conclusions.

Second, CSEA acted in good faith at all times, even going beyond what was legally required, and completely remedied

prior to the entry of summary judgment whatever harm fee payers might have incurred through the omission of the auditor's verification. Thus, in May 2000, within months after the case was filed, CSEA issued fee payers a corrected *Hudson* notice which contained complete copies of both the audited Financial Statements and the audited allocation of CSEA's major categories of expenditure between "chargeable" and "non-chargeable" classifications, as well as a recapitulation of the information set forth in its prior notices. *Id.*, App. A at 4a. The May 2000 notice also provided fee payers with a new opportunity to submit objections or challenges to the notice and thereby obtain refunds of the non-chargeable portion of the fee, plus interest, retroactive to the beginning of the fee year. *Id.*, App. A at 4a, 13a. As the Court of Appeals held, "It is undisputed that this notice complied with *Hudson*." *Id.*, App. A at 4a; *see also id.*, App. E at 36a. It is also undisputed that, prior to the entry of summary judgment by the district court, "[a]ny fee payer who had objected to any of the notices from April 1999 to May 2000 then received a refund of the nonchargeable amount of the fee, with interest, retroactive to April 1999." *Id.*, App. A at 5a; *see also id.*, App. E at 36a.

Further, both the district court and the Court of Appeals found that CSEA acted in good faith at all relevant times (*see id.*, App. A at 4a., 15a; *id.*, App. E at 41a), a finding which Petitioners do not seek to challenge here.[1] On the basis of CSEA's correction and reissuance of the *Hudson* notice, its extension of the objection/challenge period, and its provision of a refund with interest retroactive to the beginning of the fee year to any fee payer who timely requested one, the Court of

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[1] Indeed, both the district court and the Court of Appeals acknowledged that any delay in the issuance of the May 2000 notice was attributable to the district court's interim orders and comments during hearings which failed to provide clear guidance as to what was required. *Id.*, App. E at 41a; *see also id.*, App. A at 4a, 15a.

Appeals held that no further compensatory remedy was warranted or permissible. Pet. App. A at 15a.

REASONS FOR DENYING THE WRIT

The Petition should be denied because it presents no important issue which requires the attention of this Court and, moreover, identifies no square conflict between the circuits or between the Court of Appeals' decision and a decision of this Court:

First, this Court has recently denied a Petition for Writ of *Certiorari* from a decision of the Ninth Circuit filed by the same counsel from the National Right to Work Legal Foundation, Inc. (hereinafter "Right to Work") who represents Petitioners here, raising the second and third questions that Petitioners seek to raise here. *See Prescott v. County of El Dorado*, __ U.S. __, 123 S.Ct. 1251 (2003). Moreover, prior to that, this Court denied a Petition for Writ of *Certiorari* from another decision of the Ninth Circuit filed by Right to Work raising the first question that Petitioners seek to raise here. *See Foster v. Garcy*, __ U.S. __, 122 S.Ct. 2327 (2002). For the same reasons that the Court denied the petitions in *Prescott* and *Foster*, it should deny the Petition here. *See* Section I.

Second, as to the fourth question that Petitioners seek to raise here, they fail to identify any circuit conflict as to the denial of the relief they requested, restitution to all fee payers of all fair share fees collected prior to the May 2000 Notice. Instead, they rely on a purported conflict between four federal circuits and one state supreme court, on the one hand, and three other state supreme courts, on the other hand. Upon examination, however, that "conflict" is easily seen to be illusory. Further, although Petitioners purport to identify a circuit conflict as to the reversal of the district court's award of restitution to all fee payers of the non-chargeable portion of the fee collected prior to the May 2000 notice, that conflict is

illusory, as well. Two of the cases relied on by Petitioners as supporting restitution to all fee payers of the non-chargeable portion of the fee in fact do not support that remedy. The other two decisions relied on by Petitioners did not involve facts comparable to the present case, in which the union corrected and reissued the *Hudson* notice, gave fee payers a new opportunity to object to or challenge the notice, and provided refunds of the non-chargeable portion of the fee (plus interest) to all who did so in a timely manner. *See* Section II.

I. THIS COURT SHOULD DENY THE PETITION FOR THE SAME REASONS THAT IT RECENTLY DID SO IN THE *PRESCOTT* AND *FOSTER* CASES, WITH REGARD TO THE ISSUES OF PUBLIC EMPLOYER LIABILITY, FEE PAYERS' STANDING TO CHALLENGE THE FAIR SHARE FEE INDEMNIFICATION AGREE-MENT, AND THE CONSTITUTIONALITY OF THE INDEMNIFICATION AGREEMENT

In their first three Questions Presented, Petitioners seek *certiorari* on the following issues: (1) the liability of public officials for collecting fair share fees under a legally deficient *Hudson* notice; (2) the standing of fee payers to challenge an agreement whereby the union agrees to indemnify the public employer against claims arising from the collection of fair share fees; and (3) the constitutionality of such an indemnification agreement. Pet. at i. Petitioners in *Prescott v. County of El Dorado*, ___ U.S. ___, 123 S.Ct. 1251 (February 24, 2003), represented by the same Right to Work counsel who represents Petitioners in the instant case, sought to raise the second and third of those issues before this Court. The Court, however, denied their Petition for *Certiorari*, just two months ago. *Id.*

Prior to *Prescott*, Petitioners in *Foster v. Garcy*, ___ U.S. ___, 122 S.Ct. 2327 (June 3, 2002), who were also represented by Right to Work counsel, sought to raise the first issue raised here, the liability of public officials for collecting fair share fees under a legally deficient *Hudson* notice. The Court, however, denied their Petition for *Certiorari*, less than one year ago. *Id.*

The Court of Appeals in the present case relied on its prior decision in *Foster v. Madhesian*, 268 F.3d 689 (9th Cir. 2001), *cert. denied sub nom Foster v. Garcy*, 122 S.Ct. 2327 (2002), for its holding that the defendant public officials cannot incur any liability under the facts of this case. *See* Pet. App. A at 18a-19a. Similarly, the Court of Appeals in the present case relied on its prior decision in *Prescott v. County of El Dorado*, 298 F.3d 844 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 1251 (2003), for its holding that Petitioners lack standing to challenge the fair share fee indemnification clause. *See* Pet. App. A at 21a. These are the very decisions as to which this Court recently denied *certiorari*.

Nothing has changed since this Court denied a similar Petition for *Certiorari* on these same issues just two months ago. The Court of Appeals' decision merely applied precedents as to which this Court has already denied *certiorari*. There is no need here to repeat the arguments made by the respondents in *Foster* and *Prescott* as to why *certiorari* is not warranted. Rather, CSEA refers the Court to those arguments and respectfully requests it to deny the Petition in the present case as to the first three Questions Presented for the same reasons that it denied the similar petitions in *Prescott* and *Foster*.

II. PETITIONERS HAVE FAILED TO IDENTIFY A CONFLICT ON THE REMEDIAL ISSUE WARRANTING A GRANT OF *CERTIORARI*

Petitioners' fourth Question Presented seeks *certiorari* as to the Court of Appeals' remedial holding that because CSEA corrected and reissued the *Hudson* notice, gave fee payers a new opportunity to object to or challenge the notice, and provided refunds of the non-chargeable portion of the fee (plus interest) to all who did so in a timely manner—all prior to the entry of summary judgment—CSEA owed no further compensatory relief to the fee payers. *See* Pet. at i; *id.*, App. A at 11a-15a. Petitioners seek to raise two challenges to the Court of Appeals' holding: first, they argue that CSEA was legally required to return to all fee payers all of the fair share fees collected prior to the May 2000 notice; and second, that if such full restitution was not required, then CSEA was legally required to return to all fee payers the non-chargeable portion of the fee collected prior to the May 2000 notice. Pet. at 23-27. The Petition should be denied, however, because Petitioners fail to identify any conflict worthy of *certiorari* that can withstand scrutiny.

A. There Is No Conflict with Regard to Full Restitution to All Fee Payers of the Entire Fair Share Fee. Petitioners first argue that full restitution to all fee payers of all fair share fees collected under a legally deficient *Hudson* notice is mandated by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). *See* Pet. at 23-25. They are simply wrong. As Petitioners admit, "*Hudson* declined to specify the appropriate remedy . . . ." Pet. at 23. Petitioners seize on language in *Hudson* to the effect that a union may not "collect[]" fees until it meets the "constitutional requirements" set forth in that decision. *Id.* But this confuses the existence of a legal violation with the separate issue of the appropriate *remedy* for such a violation.

Moreover, to the extent that *Hudson* has any relevance to the remedial issue, it suggests that full restitution of all fees collected would *not* be appropriate. *Hudson* recognized "the important 'principle of exclusive union representation,'" as well the great deference owed to "the congressional judgment that 'it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost.'" *Hudson*, 475 U.S. at 301 n.8 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 219-20 (1977)). To effectuate this important goal of avoiding "free riders," and at the same time to protect the fee payers' rights, *Hudson* declared that the courts must "'devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*'" *Id.*, 475 U.S. at 302 (emphasis added; quoting *Abood*, 431 U.S. at 237).

Clearly, ordering a union to refund the *entire* agency fee collected from each fee payer (not merely the non-chargeable portion) would be to "deprive the union of fees to which it was, doubtlessly, entitled." *Prescott v. County of El Dorado*, 177 F.3d 1102, 1109 (9th Cir. 1999), *vacated and remanded in other part*, 528 U.S. 1111, *reinstated in relevant part on remand*, 204 F.3d 984 (9th Cir. 2000). Full restitution would therefore subvert the goal identified in *Hudson* of avoiding "restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302. Thus, far from the denial of full restitution conflicting with the reasoning of *Hudson*, it is in fact an order of full restitution that would conflict with the reasoning of *Hudson*.

Petitioners are no more successful in attempting to manufacture a conflict between four federal circuits and one state supreme court, on the one hand, and three other state

supreme courts, on the other hand, with regard to the availability of full restitution. *See* Pet. at 26-27. They admit, as they must, "three circuits and one state supreme court deem full restitution inappropriate" as a remedy for a *Hudson* violation. Pet. at 26.[2] They assert, however, that "three state supreme courts have affirmed awards of full restitution." *Id.* While that may be true, it does not create a conflict.

Two of the three state supreme court decisions relied upon by Petitioners arose as appeals from awards issued by state administrative agencies under state law. *See Wareham Educ. Ass'n v. Mass. Labor Relations Comm'n*, 430 Mass. 81 (1999); *Elvin v. Oregon Public Employees Union*, 313 Or. 165 (1992). As such, these decisions concern the authority of a state administrative agency to remedy a violation of state law, rather than the authority of a federal court to remedy a violation of the First Amendment, and any asserted conflict between them and the decision of the Court of Appeals in this case is illusory.[3]

There is also no conflict between the Court of Appeals' decision and the third state supreme court decision relied upon by Petitioners, *Gibney v. Toledo Bd. of Educ.*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1988). In *Gibney*, the Ohio Supreme Court's decision awarding restitution to all fee

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[2] In fact, as demonstrated by the decisions Petitioners cite in support of this admission, *four* federal circuits have endorsed this view. *See id.* (citing cases from the Sixth, Seventh, Ninth and Tenth Circuits).

[3] *See Elvin*, 313 Or. at 167 ("The issue in the present case is one of administrative law—whether [the state agency] exceeded its authority under [the state public collective bargaining law] in ordering [the union] to refund to respondents their fair share payments"); *Wareham*, 430 Mass. at 82-83 ("[F]ollowing a hearing, [the state administrative agency] concluded that the unions' failure to provide audited financial statements was in violation of [Massachusetts General Law chapter] 150E, §§ 12(5) and 10(b)(1). As a result of this conclusion the [agency] ordered the unions to . . . return the withheld fees to the teachers.").

payers of all fair share fees collected relied on two prior Sixth Circuit decisions, *Tierney v. Toledo*, 824 F.2d 1497 (6th Cir. 1987), and *Lowary v. Lexington Local Bd. of Educ.* ("*Lowary I*"), 854 F.2d 131 (6th Cir. 1988). *See Gibney*, 40 Ohio St. 3d 157-58. *Gibney* predicated its decision on the consideration, which it drew from *Tierney* and *Lowary I*, that the union lacked an adequate "plan," i.e., "*procedures*," to meet the constitutional requirements set forth in *Hudson*:

> *Tierney* and *Lowary* [*I*] both involve Section 1983 actions filed by plaintiffs alleging that *procedures* provided to them in connection with the collection of their service fees were constitutionally deficient. Both actions support a holding that service fees may not be collected from nonmembers until a *plan* providing for the constitutionally required procedure set forth in *Hudson*, *supra*, is in effect. The trial court in the action before us found the *plan* in question to be constitutionally insufficient with regard to its *procedures* for refunding service fees and resolving rebate disputes. Thus, the deduction of fees . . . had infringed upon the appellees' First Amendment rights. Restitution of those fees and injunctive relief prohibiting collection of further fees is a proper remedy. *See Lowary* [*I*], *supra*. We therefore find that the relief granted by the trial court in the case at bar was proper.

Gibney, 40 Ohio St. 3d at 158 (emphasis added).

Here, unlike in *Gibney*, there was no dispute about CSEA's "plan" or "procedures" for collecting fees, resolving challenges to the fee, escrowing the amounts in dispute, etc. Clearly, CSEA had "a plan providing for the constitutionally required procedure set forth in *Hudson* . . . in effect." *Id.* As set forth above, the *only* problem with CSEA's June 1999 notice was that CSEA had neglected to attach a copy of the auditor's verification. Indeed, this was at most a technical defect in a pattern of substantial compliance with *Hudson*, since CSEA informed fee payers in the notice that the

financial disclosure set forth therein had been audited, provided the auditor's name, and offered to provide the entire audit upon request. Because there was no constitutionally deficient "plan" at issue here, the issue resolved in *Gibney* was different from that resolved in the present case, and there is no conflict between *Gibney* and the Court of Appeals' decision.

Additionally, *Gibney* relied on two Sixth Circuit decisions, *Tierney* and *Lowary I*. As Petitioners admit, however, the Sixth Circuit subsequently clarified in *Lowary v. Lexington Local Bd. of Educ.* ["*Lowary II*"], 903 F.2d 422, 432-33 (6th Cir. 1990), that full restitution is *not* an appropriate remedy. *See* Pet. at 26. Thus, it is likely that, were the issue to come before it again, the Ohio Supreme Court would no longer follow its prior decision in *Gibney*, but would instead continue follow the federal law as articulated by the Sixth Circuit, this time in its intervening *Lowary II* decision.[4]

B. There Is No Conflict with Regard to Restitution to All Fee Payers of the Non-Chargeable Portion of the Fair Share Fee. Finally, Petitioners argue that the Court of Appeals' refusal to affirm the district court's award of restitution to all fee payers of the non-chargeable portion of the fair share fee conflicts with decisions of the Sixth Circuit in *Lowary II*, 903 F.2d at 432-33, and *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1533-34 (6th Cir. 1992), as well as the Tenth Circuit's decision in *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1194-95 (10th Cir. 2002), and the Wisconsin Supreme

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[4] Moreover, the *Gibney* court was not faced with the facts presented here, i.e., the union's correction and reissuance of the *Hudson* notice, its extension of the objection/challenge period, and its issuance of refunds with interest to all fee payers who timely objected to or challenged any of its *Hudson* notices. It is sheer speculation to assume that the *Gibney* court would have awarded full restitution in such circumstances.

Court's decision in *Browne v. Wisconsin Employment Relations Comm'n*, 169 Wis. 2d 79, 133 (1992). *See* Pet. at 27.

First, as noted by the Court of Appeals, *Wessel* and *Weaver* actually support the Court of Appeals' holding that no compensatory remedy was warranted or permissible due to CSEA's correction and reissuance of the *Hudson* notice, its extension of the objection/challenge period, and its provision of a refund with interest retroactive to the beginning of the fee year to any fee payer who timely requested one. *See* Pet. App. A at 14a n.2. Thus, in *Wessel*, the "Union issued a corrected Fair Share Notice," and the plaintiff "non-members were refunded the portion of the fair share fee that exceeded what they could properly be charged." *Wessel*, 299 F.3d at 1194. On that basis, the Tenth Circuit held that no further remedy was warranted. *Id.* at 1194-95. As the Court of Appeals pointed out below, each of the *Wessel* plaintiffs had objected to the original notice. *See* Pet. App. A at 14a n.2; *Wessel*, 299 F.3d at 1193.[5] Because CSEA reissued a corrected *Hudson* notice and gave refunds to each objector on its own initiative prior to summary judgment—which is what occurred in *Wessel*—the Court of Appeal's decision that no further compensatory remedy was warranted is in accord with the Tenth Circuit's decision in *Wessel*.

Weaver also supports the Court of Appeals' decision here. In *Weaver*, the Sixth Circuit declared, "Until *Hudson*'s requirements are satisfied, an employee who does not object to paying for nonchargeable items will be allowed subsequent opportunities to object." *Weaver*, 970 F.2d at 1532. Again, this is what happened in the present case: CSEA, on its own initiative, gave fee payers a new opportunity to object and

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[5] Although captioned as a class action, no class was ever certified in *Wessel* and it was therefore litigated as an individual action brought by the named individual fee payer plaintiffs.

obtain a refund in response to a corrected and reissued *Hudson* notice. Thus, *Weaver* does *not* conflict with the decision below.

Finally, neither the Sixth Circuit's decision in *Lowary II*, 903 F.2d at 432-33, nor the Wisconsin Supreme Court's decision in *Browne*, 169 Wis. 2d at 133, conflicts with the Court of Appeals' decision, due to the simple but incontrovertible fact that neither the Sixth Circuit nor the Wisconsin Supreme Court was presented with the circumstances upon which the Court of Appeals' decision here was based: the union's correction and reissuance of the notice, extension of the objection/challenge period, and provision of a refund with interest retroactive to the beginning of the fee year to any fee payer who timely requested one. The fact that the *Lowary II* and *Browne* courts approved of refunds to all fee payers of the non-chargeable portion of the fee where no such reissuance and opportunity for refund had previously been provided says nothing about whether those courts would find such a remedy appropriate where, as here, it had been provided. In other words, Petitioners' asserted "conflict" is entirely illusory because they are comparing apples and oranges. Because the *Lowary II* and *Browne* courts were faced with an entirely different factual situation than that faced by the Court of Appeals in the present case, the fact that they reached a different result is not surprising, and certainly does not create a "conflict."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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